

EXHIBIT 5

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE: HIGH TECH EMPLOYEE)
ANTITRUST LITIGATION)
) No. 11 CV 2509 LHK
THIS DOCUMENT RELATES TO:)
ALL ACTIONS.)
_____)

VIDEO DEPOSITION OF ERIC L. TALLEY, J.D., PH.D.

DECEMBER 8, 2013

Reported by: Rosalie A. Kramm, CSR No. 5469, CRR

08:56:28 1 Q. And in that CV you describe work you have done
08:56:29 2 consulting with boards of directors, correct?
08:56:30 3 A. Among other things, yes.
08:56:31 4 Q. And you have it says here that in 2010, you
08:56:32 5 were retained as an expert consultant to provide
08:56:33 6 corporate governance training to the board of directors
08:56:35 7 of Senestech Incorporated; is that right?
08:56:36 8 A. That's correct, yes.
08:56:36 9 Q. And it also says that let's see. In 2007,
08:56:38 10 2008, you were retained by Marvell Technology Group to
08:56:39 11 provide corporate governance training to senior
08:56:40 12 executives and board relating to managerial oversight,
08:56:41 13 appropriate delegation, and conflicts of interest; is
08:56:42 14 that right?
08:56:43 15 A. That's correct.
08:56:43 16 Q. Can you describe the advice you provided to
08:56:44 17 those two companies.
08:56:45 18 MR. RUBIN: Well, I would just caution to the
08:56:45 19 extent there is privilege there is a privilege issue,
08:56:47 20 I would
08:56:47 21 MR. HARVEY: Sure, let me
08:56:47 22 MR. RUBIN: I mean I don't represent them,
08:56:47 23 obviously, but I would just I'm sure Professor Talley
08:56:49 24 knows that, too, but I just want to make sure he doesn't
08:56:50 25 disclose anything.

08:56:51 1 BY MR. HARVEY:

08:56:51 2 Q. And just so we're not crossing any boundaries

08:56:52 3 here, I'm not asking for anything specific about the

08:56:53 4 substance or anything confidential with respect to those

08:56:54 5 companies. I'm just asking you generally to describe for

08:56:55 6 the kind of advice or the categories of advice you

08:56:56 7 provided.

08:56:56 8 MR. RUBIN: If you can do that without

08:56:57 9 breaching confidentiality or privilege.

08:56:58 10 THE WITNESS: So in both of the instances you

08:56:59 11 mentioned, there there were sensitive issues that I

08:57:00 12 believe that the nature of the relationship was one of

08:57:01 13 trust and confidence, and I cannot divulge. So I can

08:57:02 14 only paint these in broad strokes.

08:57:03 15 BY MR. HARVEY:

08:57:03 16 Q. You know what, why don't I stop you there and

08:57:04 17 I'll just withdraw the question.

08:57:05 18 A. Okay.

08:57:05 19 Q. During the course of your of the work that

08:57:06 20 you did for Senestech, did you ever advise Senestech to

08:57:08 21 enter into a secret company wide antisolicitation

08:57:09 22 agreement with another company, with no geographic limit,

08:57:10 23 no expiration date, and without regard to the categories

08:57:11 24 of work that the employees did?

08:57:13 25 MR. RUBIN: Objection. Form.

08:57:13 1 THE WITNESS: I don't believe that that was

08:57:14 2 part of our discussion. No.

08:57:14 3 BY MR. HARVEY:

08:57:15 4 Q. Did you ever advise Marvell Technology Group to

08:57:16 5 enter into such agreements?

08:57:16 6 MR. RUBIN: Same objection.

08:57:17 7 THE WITNESS: As per the same question you

08:57:18 8 asked earlier?

08:57:18 9 BY MR. HARVEY:

08:57:18 10 Q. Yes.

08:57:19 11 A. I don't believe that that was part of our

08:57:19 12 discussion. However, the discussion did involve issues

08:57:21 13 relating to let's see. HR and employment management,

08:57:22 14 generally. I can't get into more specifics. Sorry.

08:57:24 15 Q. And you mentioned and this is just in your

08:57:25 16 CV that among the categories was was appropriate

08:57:26 17 delegation and conflicts of interest.

08:57:27 18 Did you ever advise either of these companies

08:57:28 19 that agreements of that kind would be a good idea in

08:57:29 20 order to solve potential or actual conflicts of interest?

08:57:31 21 MR. RUBIN: Objection. Form.

08:57:31 22 THE WITNESS: Agreements of that kind is can

08:57:32 23 you

08:57:32 24 BY MR. HARVEY:

08:57:33 25 Q. Sure. Agreements such as those at issue in

08:57:34 1 this case, that is secret company wide antisolicitation
08:57:35 2 agreements with other companies, with no geographic
08:57:36 3 limit, no time limit, and no narrowing in terms of what
08:57:38 4 the employees subject to that agreement were working on
08:57:39 5 or what their titles were.

08:57:40 6 MR. RUBIN: Same objection.

08:57:40 7 THE WITNESS: Again, I want to be careful here
08:57:41 8 because of a of a confidence issue. The it is fair
08:57:43 9 to say that our discussions did involve issues that would
08:57:44 10 plausibly be related to confidentiality agreements
08:57:45 11 between companies, and that confidentiality agreements
08:57:46 12 might well have non solicit provisions in them, and those
08:57:48 13 non solicit provisions have many forms of of
08:57:49 14 application, including without restriction as to type of
08:57:50 15 employee.

08:57:51 16 BY MR. HARVEY:

08:57:51 17 Q. Which company are you referring to? Senestech
08:57:52 18 or Marvell Technology Group?

08:57:53 19 A. So these discussions did come up with the
08:57:54 20 Marvell.

08:57:54 21 Q. When you say "these discussions," you are
08:57:55 22 referring to discussions about agreements similar to
08:57:56 23 those at issue in this case?

08:57:57 24 MR. RUBIN: Objection to form.

08:57:58 25 THE WITNESS: I'm talking about agreements that

08:57:58 1 include non solicitation provisions from company to
08:58:00 2 company.

08:58:00 3 BY MR. HARVEY:

08:58:00 4 Q. And while you're listing it in your CV, so I'm
08:58:02 5 going to have to ask you, is it your understanding that
08:58:03 6 Marvell Technology Group entered into such an agreement?

08:58:04 7 MR. RUBIN: Objection. Form. And caution you
08:58:05 8 on the privilege.

08:58:06 9 THE WITNESS: I I think at this point you
08:58:06 10 are getting into facts I don't think I can I don't
08:58:07 11 think I can relate them to you. I I believe I am
08:58:09 12 under a my own confidentiality NDA with respect to the
08:58:10 13 interaction I had with with Marvell.

08:58:11 14 BY MR. HARVEY:

08:58:12 15 Q. Well, why don't I put it this way. To the
08:58:13 16 extent such an agreement existed, since you are being coy
08:58:14 17 about it, I take it it is not publicly known.

08:58:16 18 MR. RUBIN: Objection. Form.

08:58:16 19 THE WITNESS: Can you restate that question,
08:58:17 20 Mr. Harvey?

08:58:17 21 BY MR. HARVEY:

08:58:17 22 Q. Without if there were an agreement, such an
08:58:18 23 agreement, between Marvell and another company, is it
08:58:20 24 fair to say that it is not public knowledge?

08:58:21 25 MR. RUBIN: Objection. Form.

08:58:22 1 THE WITNESS: I don't know whether it is or is
08:58:23 2 not. Part of my caution is because of the fact that I
08:58:24 3 don't know whether it is or is not public public
08:58:25 4 knowledge. These sorts of agreements sometimes are
08:58:26 5 disclosed in securities filings. Sometimes they're not.

08:58:28 6 BY MR. HARVEY:

08:58:28 7 Q. And when you say "these kind of agreements,"
08:58:29 8 you mean company wide antisolicitation agreements similar
08:58:30 9 to those at issue in this case are sometimes disclosed in
08:58:31 10 SEC filings? Is that your testimony?

08:58:32 11 A. You'll sometimes see them in the context of,
08:58:33 12 you know, maybe an M&A filing where they have a
08:58:35 13 confidentiality provision and a no or a
08:58:36 14 confidentiality agreement with a no solicit clause.
08:58:37 15 Sometimes you'll see them. Sometimes they are not
08:58:38 16 disclosed.

08:58:38 17 Q. Please identify every company that has
08:58:39 18 disclosed an antisolicitation agreement similar to those
08:58:40 19 at issue in this case in an SEC filing.

08:58:42 20 MR. RUBIN: Objection. Form.

08:58:42 21 THE WITNESS: Off the top of my head,
08:58:43 22 Mr. Harvey, I I can't name the companies. I have
08:58:44 23 just in unrelated work, because I teach mergers and
08:58:45 24 acquisitions, and one of the parts of mergers and
08:58:47 25 acquisitions is is non solicits and and

08:58:48 1 confidentiality agreements. So I have spent a fair
08:58:49 2 amount of time on EDGAR trying to pull documents related
08:58:51 3 to joint ventures, to joint investment projects to asset
08:58:52 4 sales to acquisitions that that have confidentiality
08:58:53 5 agreements as as some of the exhibits, and sometimes
08:58:55 6 you will see them. I'd say most of the time you do not,
08:58:56 7 but they will sometimes work their way into the filings
08:58:57 8 as an exhibit.

08:58:58 9 And I can't I cannot list off the top of my
08:58:59 10 head every company for which I have have examined
08:59:00 11 the the NDA and how many of them had I can give
08:59:02 12 estimates, but I don't have a compilation of quantitative
08:59:03 13 data in front of me.

08:59:04 14 BY MR. HARVEY:

08:59:04 15 Q. Can you identify a single one?

08:59:05 16 A. Not off the top of my head. If you give me
08:59:07 17 some a chance to think about it, I might I might
08:59:08 18 bring it up later on in the deposition.

08:59:09 19 Q. Sure. If at any point during the deposition
08:59:10 20 you think of one

08:59:11 21 A. All right.

08:59:11 22 Q. just let me know.

08:59:11 23 A. Okay.

08:59:12 24 Q. You used the phrase "M&A" frequently in
08:59:13 25 describing this. Do you recall ever seeing an agreement

08:59:14 1 in a context outside of the merger context?

08:59:16 2 A. Yes, I've seen confidentiality agreements with

08:59:17 3 non solicits in joint venture agreements, joint

08:59:18 4 investment agreements. There is a, you know, categorical

08:59:20 5 question of what constitutes, you know, mergers and

08:59:21 6 acquisition agreements when a lot of these things don't

08:59:22 7 involve change of control or transfer of shares or or

08:59:24 8 assets from one company to another. So I've seen them in

08:59:25 9 other contexts as well.

08:59:26 10 Q. And just so the record is clear, my question is

08:59:27 11 not about confidentiality agreements generally, and it is

08:59:28 12 not about a non disclosure agreements generally, and

08:59:29 13 it is not about non solicits generally. It is a very

08:59:31 14 specific question. And that is, whether agreements such

08:59:32 15 as those at issue in this case, as I've defined them,

08:59:33 16 that is company wide antisolicit company wide

08:59:34 17 antisolicitation agreements without any restriction in

08:59:36 18 terms of geography, with no time limit, and with no

08:59:37 19 narrowing in terms of categories of employees.

08:59:39 20 MR. RUBIN: Objection. Form.

08:59:39 21 THE WITNESS: Well, one thing to remember,

08:59:40 22 Mr. Harvey, is that and I'm trying to answer this

08:59:41 23 the question here is that I'm referring to contracts

08:59:43 24 that have non solicit provisions that have many of the

08:59:44 25 features that you refer to. The notion of, say, a joint

09:10:11 1 BY MR. HARVEY:

09:10:12 2 Q. When you are telling your students that

09:10:12 3 agreements like this would be a good idea, do you tell

09:10:13 4 them about the Department of Justice investigation that

09:10:16 5 preceded this action?

09:10:16 6 A. This my involvement in this case is a month

09:10:17 7 old. I last taught a class that that pertained to

09:10:19 8 this in the spring of 2013. This case didn't come up in

09:10:20 9 that instance. But, you know, there is a unit in the

09:10:22 10 class on confidentiality agreements, and we discussed

09:10:23 11 non solicits as part of that.

09:10:24 12 Q. When was well, first let me say, are you

09:10:25 13 aware sitting here that the Antitrust Division of the

09:10:26 14 United States Department of Justice conducted an

09:10:27 15 investigation into the conduct at issue in this civil

09:10:28 16 case?

09:10:29 17 A. Yes, I am aware of that.

09:10:30 18 Q. When was that investigation first made public?

09:10:31 19 MR. RUBIN: Objection. Form.

09:10:31 20 THE WITNESS: I did not investigate this.

09:10:32 21 I'm I think it probably was a few years ago.

09:10:33 22 BY MR. HARVEY:

09:10:33 23 Q. And this advice to your students, did that take

09:10:35 24 place before or after that was made public?

09:10:36 25 A. The advice that

09:10:36 1 Q. That it would be a good idea to enter into
09:10:37 2 agreements like this?
09:10:38 3 A. That is not
09:10:38 4 MR. RUBIN: Objection. Form.
09:10:39 5 THE WITNESS: Sorry. The what you
09:10:39 6 characterized as advice, I'm going to recharacterize as
09:10:41 7 what I present to my students, which is that non solicit
09:10:42 8 agreements can be can play a helpful role in
09:10:43 9 facilitating various types of collaborative relationships
09:10:45 10 or negotiations under the appropriate circumstances. All
09:10:47 11 right? But this should not be understood as advising
09:10:48 12 them to get into such agreements willy nilly.
09:10:49 13 BY MR. HARVEY:
09:10:49 14 Q. Are you aware that there was a consent decree
09:10:50 15 entered in the DOJ case that was entered as a final
09:10:52 16 judgment in the district of DC?
09:10:53 17 A. I'm aware of this, yes.
09:10:54 18 Q. But you haven't reviewed it, correct?
09:10:55 19 A. I haven't spent I may have glanced at it,
09:10:56 20 but I didn't spend any appreciable time with it.
09:10:57 21 Q. Are you aware that that consent decree lays out
09:10:59 22 the circumstances under which non solicits may or may not
09:11:00 23 be appropriate when formed in conjunction with specific
09:11:01 24 collaborations?
09:11:02 25 MR. RUBIN: Objection. Form.

09:11:02 1 THE WITNESS: I'm aware that the the consent
09:11:03 2 decree who drafted it, I do not know, and I am aware
09:11:05 3 that it lays out some parameters. I am not aware that it
09:11:07 4 is a set of parameters that speaks generally to when
09:11:08 5 something is appropriate or not. It it my sense is
09:11:09 6 that it's a settlement, and it was brokered by some
09:11:11 7 lawyers who I do not know.

09:11:12 8 BY MR. HARVEY:

09:11:12 9 Q. Do you understand that all the defendants in
09:11:13 10 this case agreed to that final judgment?

09:11:14 11 A. I believe I yes, I believe I've seen
09:11:15 12 reference to that, yeah.

09:11:16 13 Q. And do you understand that that final judgment
09:11:16 14 was entered by the judge in that action?

09:11:18 15 MR. RUBIN: Objection. Form.

09:11:19 16 THE WITNESS: I haven't seen evidence one way
09:11:19 17 or the other to that, but we can stipulate.

09:11:21 18 BY MR. HARVEY:

09:11:21 19 Q. Is there a reason why you didn't read that
09:11:22 20 document?

09:11:22 21 MR. RUBIN: Objection. Form.

09:11:23 22 THE WITNESS: I was asked to review the nature
09:11:24 23 of the agreements between around 2005 and 2009. The
09:11:25 24 consent decree itself is a legal document. My my
09:11:26 25 understanding of my engagement in this case was to

09:42:05 1 agreement ever occurred?

09:42:05 2 A. I don't believe I have.

09:42:06 3 Q. Okay. Okay. If you can go to page 11 and

09:42:07 4 paragraph 32, please.

09:42:08 5 A. Got it.

09:42:08 6 Q. There again in the penultimate sentence, you

09:42:09 7 list as as potential negative consequences to the

09:42:11 8 absence of a do not call agreement that the participants

09:42:12 9 might, quote, "develop wasteful incentives to curtail

09:42:14 10 investments in their employees' skills, to ration

09:42:15 11 employees access to proprietary information, or to limit

09:42:16 12 collaborators access to the most valuable employees and

09:42:17 13 other corporate resources."

09:42:18 14 Do you see that?

09:42:19 15 A. Yes.

09:42:19 16 Q. Have you seen any evidence to suggest and I

09:42:20 17 want you to be specific here, about a specific

09:42:21 18 collaboration, that occurred prior to 2005, in which the

09:42:22 19 participants developed wasteful incentives to curtail

09:42:24 20 investment in their employees' skills?

09:42:25 21 MR. RUBIN: Objection. Form.

09:42:25 22 THE WITNESS: So the I can probably answer

09:42:26 23 that what would I call it, the contra positive of this

09:42:28 24 question. The the pre 2005 is a period before the

09:42:29 25 alleged DNCC agreements came into existence.

09:42:30 1 One potential adverse effect is that it may
09:42:32 2 limit the depth and scope and intensity of a
09:42:33 3 collaboration. I have not tried to measure the depth or
09:42:34 4 scope, but there is evidence that when the DNCCs are in
09:42:36 5 existence, people complain about, hey, listen, I sent you
09:42:37 6 my best guy, and you just stole him away. I it's
09:42:39 7 I'm trying to imagine whether such a document would exist
09:42:40 8 before the alleged DNCCs came into existence.

09:42:42 9 BY MR. HARVEY:

09:42:42 10 Q. So you have not, as an empirical matter,
09:42:43 11 determined whether any of the collaborations that existed
09:42:45 12 prior to 2005 developed a wasteful incentives among
09:42:46 13 the collaborators to curtail investments in their
09:42:47 14 employees' skills?

09:42:48 15 A. I have not. I believe it also would be a very
09:42:49 16 difficult thing to quantify if directly. It's a it
09:42:50 17 is essentially trying to quantify the dog that doesn't
09:42:52 18 bark.

09:42:52 19 Q. And the same is true after 2009, correct? That
09:42:53 20 you have not conducted or you you don't know
09:42:54 21 empirically whether the collaborations that occurred
09:42:56 22 after the agreements ended developed wasteful incentives
09:42:57 23 to curtail investments in their employees' skills.

09:42:58 24 A. I I curtailed my analysis at 2009 when the
09:42:59 25 DNCCs alleged DNCCs were to have come to an end. So I

09:43:01 1 wasn't you know, I don't think my report talks about
09:43:02 2 collaborations afterward.

09:43:03 3 I have seen some evidence of some some
09:43:04 4 collaborations, but I didn't do a detailed analysis of
09:43:05 5 that post 2009.

09:43:05 6 Q. So you didn't analyze the post conspiracy
09:43:06 7 period, correct?

09:43:07 8 A. I did not analyze the the the period that
09:43:08 9 is after the alleged conspiracy, correct.

09:43:09 10 Q. Okay. Is your answer the same for the
09:43:10 11 preconspiracy period? Did you analyze that?

09:43:11 12 A. A little bit. Part of the part of the
09:43:12 13 reason to analyze a little bit of the preconspiracy
09:43:14 14 period or the alleged conspiracy period is to get a sense
09:43:15 15 about whether the relationship between two parties to one
09:43:16 16 of these alleged agreements was was growing,
09:43:18 17 whether where they were becoming more involved with
09:43:19 18 one another on a on multiple collaborative prospective
09:43:20 19 and realized collaborative venues.

09:43:21 20 So, for instance, I think somewhere in the
09:43:23 21 report I note that collaboration between Apple and Google
09:43:24 22 started as early as 2002, but then, you know, picked up
09:43:26 23 as well. And and there were significant numbers of
09:43:27 24 collaborations after the alleged DNCCs were to have
09:43:28 25 alleged to have begun in 2005.

09:43:29 1 Q. You know, that leads me to another question I
09:43:30 2 have.

09:43:30 3 Are you offering an opinion that the
09:43:31 4 collaborations that Google had with other defendants
09:43:32 5 picked up after 2005?

09:43:33 6 MR. RUBIN: Objection. Form.

09:43:33 7 BY MR. HARVEY:

09:43:34 8 Q. Or increased in some way. I think you used the
09:43:35 9 phrase "picked up," but however you want to describe it.

09:43:36 10 A. All I am saying is that DNCCs can facilitate
09:43:38 11 the the both the intensity and the extensiveness of
09:43:39 12 collaborations between between the parties. It is a
09:43:41 13 perfectly plausible and sensible economic justification,
09:43:42 14 and that is an efficiency enhancing justification for
09:43:43 15 them.

09:43:43 16 Q. I understand that. But I think you said that
09:43:44 17 maybe 30 times, and I haven't asked you about that.

09:43:45 18 A. Thirty four times.

09:43:46 19 Q. So I understand that you want to get it out
09:43:46 20 there, and you have. My question is different.

09:43:47 21 My question is whether you have done an
09:43:48 22 empirical assessment to determine whether the
09:43:49 23 collaborative activity that Google had with the other
09:43:51 24 defendants materially increased after 2005

09:43:51 25 A. Yes.

09:43:52 1 Q. as compared to before 2005.

09:43:53 2 A. I have not tried to do that empirical

09:43:53 3 quantitative assessment. The it would be challenging

09:43:55 4 on a number of different grounds. It is not just a

09:43:56 5 counting exercise of how many collaborative agreements

09:43:58 6 did they enter into. There may be informal collaborative

09:43:59 7 relationships that are entered into.

09:44:01 8 The intensity of those relationships would have

09:44:02 9 to be measured. So it's a it is a very difficult

09:44:03 10 empirical puzzle. I have not tried to do an empirical

09:44:05 11 assessment, but I just flagged that it would be a

09:44:06 12 challenging thing to do.

09:44:07 13 MR. HARVEY: I think we are five minutes away

09:44:08 14 from lunch, and so rather than plowing through for

09:44:09 15 another half hour, I'm inclined to take a break for lunch

09:44:10 16 now, if that is okay with you guys.

09:44:12 17 MR. RUBIN: You mean five minutes away from...

09:44:13 18 THE WITNESS: You are ordering in?

09:44:13 19 MR. RUBIN: That is fine.

09:44:14 20 THE WITNESS: Fine by me.

09:44:14 21 THE VIDEOGRAPHER: We are now off the record at

09:44:15 22 12:23 p.m.

09:44:15 23 (Luncheon recess was take.)

10:17:13 24 THE VIDEOGRAPHER: This is Tape 4 of the

10:17:14 25 Deposition of Dr. Eric Talley. We're now on the record

10:17:18 1 at 1:17 p.m.

10:17:22 2 MR. HARVEY: For the record, during the break
10:17:24 3 counsel for plaintiffs identified that what had been
10:17:26 4 marked as Exhibit 2921, which is Dr. Talley's report,
10:17:30 5 inadvertently included the highlighting. Counsel for
10:17:35 6 defendants have agreed to swap out that exhibit with a
10:17:42 7 version that does not have that highlighting.

10:17:45 8 Is that correct, Mr. Rubin?

10:17:47 9 MR. RUBIN: Yes, that's correct.

10:17:49 10 MR. HARVEY: Thank you.

10:17:51 11 Q. Dr. Talley, did you review contracts produced
10:17:56 12 by the defendants that memorialized certain
10:17:59 13 collaborations?

10:17:59 14 A. I believe I did, yes.

10:18:01 15 Q. Okay. Did you see in any of the contracts you
10:18:05 16 reviewed a reference to the do not call agreements at
10:18:08 17 issue in this case?

10:18:11 18 A. I don't believe I did. They may it may be
10:18:15 19 in there, but I don't believe I saw it.

10:18:17 20 Q. Okay. Could you go to page 11 of your report.

10:18:26 21 A. Sure.

10:18:27 22 Q. And specifically paragraph 33.

10:18:37 23 A. Got it.

10:18:37 24 Q. Okay. And I'm going to direct your attention
10:18:46 25 to the penultimate sentence, they are always the

10:18:48 1 penultimate sentence, in paragraph 33 where you say,

10:18:53 2 quote, "A telling measure of consensus best practices is

10:18:56 3 provided " oh, scratch that.

10:19:00 4 Beginning with, quote, "Prominent model

10:19:02 5 confidentiality/non disclosure agreements include

10:19:07 6 provisions for either the unilateral or bilateral

10:19:10 7 non solicitation of the negotiating parties' employees."

10:19:16 8 Do you see that?

10:19:17 9 A. Yes.

10:19:17 10 Q. And the sentence preceding that which I began

10:19:20 11 to read was, "A telling measure of consensus best

10:19:21 12 practices "

10:19:22 13 A. Yes.

10:19:22 14 Q. " is provided by such agreements."

10:19:24 15 Do you see that?

10:19:26 16 A. Yes, I do.

10:19:27 17 Q. And the support for this assertion is that

10:19:30 18 you provided in your report here, is footnote 23,

10:19:34 19 correct?

10:19:35 20 A. Yes.

10:19:42 21 MR. HARVEY: Please mark Plaintiffs'

10:19:44 22 Exhibit 2923.

10:19:58 23 THE REPORTER: 2923.

10:20:11 24 (Exhibit 2923 was marked for identification.)

25 //

10:20:11 1 BY MR. HARVEY:

10:20:11 2 Q. And Exhibit 2923 is the document to which you

10:20:13 3 cite in footnote 23, right?

10:20:16 4 A. Yes, it appears to be.

10:20:27 5 Q. And if you go to the first page of the

10:20:30 6 document

10:20:31 7 A. Yes.

10:20:31 8 Q. it is the "Model Merger Agreement for the

10:20:33 9 Acquisition of a Public Company."

10:20:36 10 Do you see that?

10:20:36 11 A. Correct.

10:20:37 12 Q. Do you have any evidence in this case that any

10:20:39 13 defendant considered merging with any other defendant?

10:20:49 14 A. It's unclear to me one way or the other. It's

10:20:52 15 certainly possible that there were negotiations about

10:20:56 16 many times a merger negotiation may start as a joint

10:21:01 17 venture negotiation. So but I haven't seen direct

10:21:06 18 statements about potential mergers.

10:21:08 19 This this model agreement has both the

10:21:13 20 definitive merger agreement in it, and then a series of

10:21:16 21 other attendant agreements that often will long predate a

10:21:20 22 merger agreement.

10:21:28 23 Q. Okay. You cite to pages 341 to 371, correct?

10:21:33 24 A. Yes.

10:21:33 25 Q. And are those pages contained in in

10:21:37 1 Exhibit 2923?

10:21:39 2 A. They this appears to be a a version an

10:21:44 3 abbreviated version of the ABA of the ABA model

10:21:50 4 agreement or agreements, and the part that is included

10:21:55 5 here after the cover page is the model confidentiality

10:21:58 6 agreement.

10:22:00 7 Q. And these are the pages you cited in note 23,

10:22:04 8 are they not?

10:22:05 9 A. It appears that they are, yes.

10:22:07 10 Q. And if you go to page 341

10:22:09 11 A. Yes.

10:22:09 12 Q. the first sentence in bold is, "The Model

10:22:12 13 Confidentiality Agreement and Commentary is the

10:22:15 14 confidentiality agreement related to the Model Merger

10:22:19 15 Agreement." Do you see that?

10:22:20 16 A. Yes.

10:22:21 17 Q. Okay. And if you go to page 342

10:22:32 18 A. Yes.

10:22:33 19 Q. of the document, under the heading, "TYPICAL

10:22:36 20 PROVISIONS," there is a subheading or I should say the

10:22:40 21 text begins, "At a minimum, a confidentiality agreement

10:22:44 22 normally covers the following points:" And it lists six

10:22:50 23 bullet points, correct?

10:22:54 24 A. Let me count. One, two, three, four yes,

10:22:57 25 six bullet points.

10:22:58 1 Q. Is prohibiting the solicitation of employees
10:23:01 2 any of those bullet points?
10:23:03 3 A. It is not in those six.
10:23:05 4 Q. Then the next section says, "Other provisions
10:23:09 5 that may be included in a confidentiality agreement
10:23:11 6 depend upon the varying factual circumstances in which
10:23:15 7 the agreement arises and may include:" and then it lists
10:23:19 8 three bullet points, correct?
10:23:20 9 A. That is correct.
10:23:23 10 Q. And the provision regarding solicitation of
10:23:25 11 employees is that first bullet point, correct?
10:23:28 12 A. Yes.
10:23:39 13 Q. Now, if you could go ahead to page 366 of that
10:23:45 14 same exhibit, where Section 11, the heading is
10:23:51 15 "Non Solicitation," do you see that?
10:23:53 16 A. Yes.
10:23:59 17 Q. And in the model agreement it says that, "Each
10:24:01 18 party to this letter agreement agrees that, for a period
10:24:05 19 of two years from the date hereof," and so forth. Do you
10:24:10 20 see that?
10:24:11 21 A. Yes, I do.
10:24:12 22 Q. Okay. And then if you go to the commentary,
10:24:20 23 I'd like you to look at the second sentence there, where
10:24:25 24 it says, "This is most often the target's concern, and
10:24:29 25 the concern is most likely to be present in the case of

10:24:32 1 smaller companies and technology or other companies where
10:24:36 2 there are a few key employees who have valuable knowledge
10:24:39 3 and skills or who are especially important to the
10:24:43 4 company's customer relations."

10:24:45 5 Do you see that?

10:24:45 6 A. I do see this, yes.

10:24:47 7 Q. And then the next sentence reads: "Many buyers
10:24:50 8 will object to non solicitation provisions, particularly
10:24:54 9 ones that purport to apply to employees of the buyer who
10:24:59 10 do not even know about the possible transaction with the
10:25:02 11 target." Do you see that?

10:25:03 12 A. I do, yes.

10:25:05 13 Q. Okay. And then following that section, the
10:25:10 14 comment lists potential ways to address that concern from
10:25:14 15 the buyer. Do you see those bullets? There are one,
10:25:18 16 two, three, four of them.

10:25:20 17 A. Yes.

10:25:21 18 Q. And the first one is to "reduce the
10:25:23 19 non solicitation period," correct?

10:25:25 20 A. Yes.

10:25:26 21 Q. And that would be reducing it from two years to
10:25:29 22 something shorter, correct?

10:25:30 23 A. One would assume, correct.

10:25:31 24 Q. Okay. And the second bullet is to "limit the
10:25:34 25 provision to the employees or other representatives of

10:25:37 1 the buyer who are involved in (or possibly aware of) the
10:25:42 2 possible transaction." Do you see that?

10:25:44 3 A. Yes.

10:25:45 4 Q. And then the third bullet is, "limit the
10:25:48 5 provision to a specific subset of the target's employees,
10:25:54 6 with such subset being defined by a specific list or
10:25:58 7 category (for example, officers, employees" or I
10:26:04 8 should say, "officers, employees at the level of vice
10:26:07 9 president or above, key technical or salespersons, or
10:26:11 10 persons identified in the due diligence and negotiation
10:26:14 11 process)."

10:26:15 12 Do you see that?

10:26:15 13 A. Yes.

10:26:16 14 Q. Okay. Okay. You can put that aside.

10:26:27 15 A. Okay.

10:27:00 16 Q. Moving to a different topic, in conducting your
10:27:02 17 analysis, did you consider whether there were potentially
10:27:07 18 less restrictive versions of the agreements at issue in
10:27:11 19 this case that would still serve the the other
10:27:17 20 purposes you described in your report?

10:27:20 21 A. Can you give me an example? That might help.

10:27:24 22 Q. Sure. So, for example, instead of the
10:27:26 23 agreements being with respect to all employees from the
10:27:33 24 chef to the administrative assistant to the software
10:27:35 25 engineer, that the agreements would be tailored to

10:57:18 1 be something that, you know, you can identify a clear set
10:57:21 2 of employees for.

10:57:23 3 You might and, in fact, if it is a if the
10:57:28 4 costs are intense enough you might reduce your investment
10:57:32 5 in the collaboration to the point of being zero. That
10:57:34 6 would be the extreme case, but it could be sort of a
10:57:37 7 softer form of collaboration, maybe a less diligent form,
10:57:42 8 a less spirited form of collaboration.

10:57:45 9 Similarly, with with time limitations, you
10:57:50 10 might sort of say, okay, let's try to figure out what
10:57:55 11 when this collaboration is going to end, how long is it
10:57:58 12 going to take us to develop this thing, and suppose it is
10:58:01 13 going to take us you know, we think it is going to
10:58:03 14 take us 14 months, so let's tack on another 18 months
10:58:08 15 after that, so you get 32 months; and then someone else
10:58:11 16 tells you, well, it could take 14 months, but it's kind
10:58:14 17 of like, you know, building the Bay Bridge, which could
10:58:17 18 take longer than than 14 months, so maybe we should
10:58:20 19 toll that time until the end of the collaboration.

10:58:25 20 Another possibility is, well, okay, what
10:58:27 21 happens if during this collaboration there is an obvious
10:58:31 22 add on, and then we have to worry a little bit about
10:58:35 23 saying, you know, do we call it part of the collaboration
10:58:38 24 or not; and if we do, then does that tolling period go
10:58:43 25 even longer? And that may be a very difficult thing to

10:58:47 1 compute.

10:58:47 2 And so my sense is that that one of the

10:58:52 3 costs, or the the responsive costs, then, would be to

10:58:56 4 say, well, maybe we don't dip our toes in the water as

10:59:00 5 deeply as we otherwise would have.

10:59:02 6 Q. So the conversation or I should say your

10:59:05 7 answer as you just provided, that was, you know,

10:59:08 8 hypothetically, if Google were to hire Google hasn't

10:59:12 9 in fact hired you to do this, correct?

10:59:14 10 A. Not to my knowledge.

10:59:18 11 Q. And moving back to the conspiracy period, 2005

10:59:29 12 to 2009, have you identified a specific collaboration

10:59:35 13 that would not have happened in the absence of the

10:59:38 14 do not call agreements that the defendants engaged in?

10:59:43 15 MR. RUBIN: Objection. Form.

10:59:44 16 THE WITNESS: Yeah, so I would say that

10:59:46 17 that remember, I think there are two different issues,

10:59:49 18 and I'll do econo head speak again, about the extensive

10:59:54 19 margin, right, does something happen or not; and the

10:59:57 20 intensive margin, right, if something happens, how much

11:00:01 21 do you invest in it? How deep do you go? How deep do

11:00:04 22 you you know, do you dip your toe, your leg, your

11:00:07 23 ankle, your knee into the water.

11:00:10 24 And so so my sense from the documents I've

11:00:12 25 read is that at the very least there are some

11:00:15 1 collaborations that would not have been as as intense
11:00:21 2 as or as as I don't know how to as close as
11:00:28 3 they would otherwise have been, but for the existence of
11:00:34 4 some of the security provided by the DNCCs or the DNCC
11:00:41 5 guidelines.

11:00:42 6 Whether that you know, remember the the
11:00:44 7 complete absence of a collaboration is in some ways the
11:00:49 8 limiting case, the extreme case, right? The the
11:00:51 9 disincentive is so strong that the you know, your
11:00:54 10 intensive margin goes to zero. You just don't want to do
11:00:58 11 the thing at all.

11:00:59 12 So it's hard for me to say, oh, this, you know,
11:01:01 13 absolutely wouldn't have taken place but for the DNCCs,
11:01:06 14 but it is plausible that a variety of these
11:01:08 15 collaborations would have been dialed significantly down,
11:01:11 16 or at least measurably down, without the assurances or
11:01:16 17 without at least the the possible security provided by
11:01:22 18 the DNCC guidelines.

11:01:24 19 BY MR. HARVEY:

11:01:25 20 Q. Okay. I think I asked you if you identified in
11:01:29 21 your report any collaborations that would not have
11:01:34 22 happened. I understand your opinion about the intensity.
11:01:36 23 Now I'm just focused on what you characterize as an
11:01:41 24 extreme case, that is collaborations that would not have
11:01:43 25 happened. Do you identify collaborations that would not

11:01:46 1 have happened?

11:01:47 2 A. I can't say for sure whether they would have

11:01:48 3 happened or not. But, for instance, I think we talked a

11:01:51 4 little bit earlier about Mr. Otellini's complaints about

11:01:57 5 his site person being being hired away, and it's

11:02:00 6 plausible that he would not have given access to that

11:02:06 7 site selection person but for his belief that the person

11:02:10 8 was not going to get was not going to get poached.

11:02:16 9 Q. Do you have an opinion one way or the other

11:02:18 10 about whether that site selection collaboration, let's

11:02:21 11 call it that

11:02:22 12 A. Yeah.

11:02:23 13 Q. would have or would not have happened in the

11:02:26 14 absence of a do not call agreement?

11:02:28 15 MR. RUBIN: Objection. Form.

11:02:29 16 THE WITNESS: I don't have a sense for sure

11:02:31 17 whether it would not have happened. It is possible it

11:02:33 18 might not have, or even if it did happen, pretty

11:02:36 19 plausible that it would have been dialed down. But I

11:02:39 20 can't sit here and say for sure, oh, no, this never would

11:02:42 21 have happened, but it may have happened in a different

11:02:45 22 flavor or a different intensity than it did.

11:02:48 23 BY MR. HARVEY:

11:02:48 24 Q. So aside from the possibility of that one, are

11:02:51 25 there any others I should say, because I don't think

11:02:53 1 that one qualifies, are there any others that you have
11:02:58 2 identified that would not have happened but for these
11:03:00 3 agreements?

11:03:01 4 MR. RUBIN: Objection to form.

11:03:03 5 THE WITNESS: I think my answer will be
11:03:04 6 similar. It's hard to to say, oh, the the lack of
11:03:07 7 a DNCC set of protocols would have dialed down the
11:03:11 8 interaction to zero, but it's possible that it would have
11:03:14 9 for other ones as well.

11:03:16 10 BY MR. HARVEY:

11:03:16 11 Q. Okay. And that's not my question. I'm not
11:03:19 12 asking you to assess the difficulty or whether it may
11:03:22 13 have happened somewhere or speculate. I am asking you if
11:03:26 14 you can point to one, one collaboration, one specific
11:03:30 15 collaboration that you've seen in this case, where you
11:03:33 16 have an opinion that this collaboration would not have
11:03:35 17 happened but for the do not call agreements?

11:03:39 18 MR. RUBIN: Objection. Form.

11:03:41 19 THE WITNESS: I have not I can't sit here
11:03:44 20 and say, "Oh, this clearly would not have happened," but
11:03:47 21 I also I'd fight you a little bit on the nature of the
11:03:50 22 question. It's it's sort of like saying, well, if we
11:03:55 23 impose a tax on a good, will the will the price of the
11:04:00 24 good rise? Will consumption fall? I think the answer is
11:04:04 25 probably it would.

11:04:05 1 BY MR. HARVEY:

11:04:05 2 Q. I'm not going to fight you on that.

11:04:07 3 A. Would the price be zero? Would the market

11:04:10 4 disappear completely? Probably not. But it would be a

11:04:14 5 shadow of its former self.

11:04:15 6 Q. I decline to get into a debate about my

11:04:18 7 question.

11:04:18 8 A. Okay.

11:04:18 9 Q. So now going back to the other side of it,

11:04:21 10 where you say that there may be some collaborations that

11:04:23 11 were not as intense or, that but for the agreements the

11:04:31 12 agreements would have been less I'm sorry, the

11:04:34 13 collaborations would have been less intense, have you

11:04:37 14 identified any specific collaborations where you have an

11:04:42 15 opinion that this collaboration would have been less

11:04:45 16 intense?

11:04:46 17 A. Oh, I think we talked about one, the Otellini

11:04:50 18 site selection. There are a few others I cited with

11:04:55 19 Intel. I think in Bill Campbell's advisory role with

11:04:59 20 in particular pertaining to executive coaching, corporate

11:05:02 21 governance at Google as a shareholder of Intuit, that may

11:05:06 22 well have also been one of these situations where the

11:05:09 23 the nature, the extent, the depth, the intensity of

11:05:14 24 those of those advisory those pieces of advice

11:05:24 25 would have gotten less specific and less helpful.

11:05:28 1 Q. So aside from those two categories, do you have
11:05:30 2 any others?

11:05:31 3 A. I think it's quite plausible that that some
11:05:36 4 of the various collaborations with Apple that we've been
11:05:39 5 discussing may have become dialed down, less less
11:05:45 6 focused, less deep.

11:05:47 7 Q. And I'm not asking you whether it's a
11:05:50 8 possibility. I'm saying sitting here, have you formed an
11:05:52 9 opinion that but for the agreements specific
11:05:56 10 collaborations would have been less intense?

11:06:00 11 MR. RUBIN: Objection. Form.

11:06:02 12 BY MR. HARVEY:

11:06:03 13 Q. Do you hold that opinion as to the Apple
11:06:05 14 collaboration?

11:06:05 15 A. So I don't think you can exclude, absolutely
11:06:08 16 exclude anything, but I think there's a there's a good
11:06:11 17 likelihood that they would have been less intense, yes.

11:06:15 18 Q. Good likelihood. Okay.

11:06:20 19 And you said that the the intensity would
11:06:23 20 have measurably decreased. How would you go about
11:06:28 21 measuring the intensity of a collaboration?

11:06:32 22 A. Well, let's pick a type of collaboration. Do
11:06:35 23 you want to think about, you know, Intel?

11:06:41 24 Q. Let's pick one so we can kind of make it
11:06:43 25 concrete. The Bill Campbell advice to Google.

11:06:47 1 A. All right. So Campbell is sort of a, you know,

11:06:51 2 an informal advisor to to to Mr. Schmidt during a

11:06:57 3 fair amount of this time, and and this is all this

11:07:02 4 is in part because Google is still a growing company,

11:07:05 5 from what I understand, trying to give Schmidt a sense

11:07:09 6 of, you know, how to how to scale, how to grow, what

11:07:13 7 sorts of of, you know, strategic maybe human resources

11:07:18 8 issues are likely to be confronted as as one is

11:07:22 9 growing, regulatory clearance issues and so forth.

11:07:27 10 One possibility, and it seems quite plausible

11:07:32 11 in this in this situation, is that Campbell might say,

11:07:35 12 hey, listen, if you've got an, you know, issue related

11:07:38 13 to, I don't know, OSHA compliance or some other

11:07:42 14 regulatory issue, we've got a we've got a pretty good

11:07:46 15 regulatory person, I think we found the right way to do

11:07:49 16 it. Let me put your people in touch with that person so

11:07:53 17 you can they can give you a sense of how we did it.

11:07:55 18 Or maybe a Sarbanes

11:07:59 19 Q. We'll stop there

11:08:01 20 A. Yeah.

11:07:59 21 Q. just so I can you got to stop at some

11:07:59 22 point.

11:08:02 23 MR. RUBIN: Can we take a very short break,

11:08:04 24 actually?

11:08:05 25 THE WITNESS: I'd be happy to.

11:08:06 1 MR. HARVEY: Let's just finish this little

11:08:07 2 segment.

11:08:09 3 MR. RUBIN: Okay.

11:08:10 4 MR. HARVEY: I'll be quick, though, if I can.

11:08:12 5 MR. RUBIN: All right.

11:08:12 6 BY MR. HARVEY:

11:08:13 7 Q. So you gave an example of Campbell pointing to

11:08:18 8 someone at Intuit who might have some expertise on OSHA

11:08:23 9 compliance.

11:08:24 10 A. Or Sarbanes Oxley compliance.

11:08:26 11 Q. Sure. And so the measurement comes in terms of

11:08:29 12 he would he might not do that, and so you would tally

11:08:32 13 up

11:08:34 14 MR. RUBIN: No pun intended.

11:08:35 15 BY MR. HARVEY:

11:08:35 16 Q. the times when he would the times when he

11:08:36 17 would give advice versus when he wouldn't, and but for

11:08:40 18 the agreements we have some number?

11:08:42 19 A. Yeah, you might try to get a sense of, okay,

11:08:43 20 when that happened, at what level of of direct contact

11:08:47 21 did you know, would he put them in touch with this

11:08:51 22 person or say, I'm going to I'm going to go try and

11:08:52 23 find out and I'll give you a few a few hints what I

11:08:55 24 can find out. Or maybe not do it as frequently as he

11:08:59 25 would have otherwise with knowing that that Google

11:09:03 1 wasn't going to turn around and and cold call that
11:09:06 2 person in to recruit them in.

11:09:07 3 And so I think it's both kind of the level of
11:09:11 4 access, the degree of specificity, and the frequency of
11:09:15 5 that kind of an access, are the dimensions that I guess
11:09:18 6 I'd be interested in.

11:09:19 7 Q. And you you'd be interested in it. Have
11:09:22 8 you, in fact, done that analysis?

11:09:24 9 A. I have not.

11:09:25 10 Q. Okay. And in this case, in the case of Bill
11:09:30 11 Campbell, Intuit was a party to an agreement with Google
11:09:34 12 for about two years, correct, 2007, 2009?

11:09:40 13 A. Something like that.

11:09:40 14 Q. Did you try to measure the difference between
11:09:42 15 the amount or the intensity of his advice before the
11:09:45 16 conspiracy period, during and after?

11:09:47 17 A. I did not try to do a quantitative measurement
11:09:51 18 in the way that you're speaking.

11:09:53 19 MR. HARVEY: Okay. Why don't we take a break.

11:09:56 20 THE VIDEOGRAPHER: We are now off the record at
11:09:57 21 2:09 p.m.

11:09:58 22 (Recess was taken.)

11:27:34 23 THE VIDEOGRAPHER: This is Tape 5 of the
11:27:35 24 Deposition of Dr. Eric Talley. We are now on the record
11:27:39 25 at 2:27 p.m.

11:27:42 1 BY MR. HARVEY:

11:27:43 2 Q. Switching topics to board memberships and so

11:27:45 3 forth

11:27:46 4 A. Yes.

11:27:46 5 Q. is it your understanding that the Plaintiffs

11:27:48 6 in this case are attacking the fact of the overlapping

11:27:52 7 boards as themselves being a violation of the law?

11:27:58 8 A. Not quite that directly, but something akin to

11:28:04 9 that, I guess.

11:28:05 10 Q. What do you have in mind in terms of being akin

11:28:08 11 to that?

11:28:09 12 A. You know, I think it's in my report, and and

11:28:18 13 so on page 5, "Plaintiffs' conspiracy claims appear to

11:28:24 14 focus on the fact that various Defendant companies had

11:28:27 15 board members who also served on boards of other

11:28:29 16 Defendant companies, or alternatively had some analogous

11:28:30 17 fiduciary duty role in other Defendant companies.

11:28:30 18 Plaintiffs imply that this sort of interrelatedness

11:28:30 19 between corporate entities is anomalous, and was either

11:28:38 20 deliberately created or directly permitted by defendants

11:28:40 21 to effectuate the DNCCs with the goal of suppressing

11:28:45 22 compensation."

11:28:46 23 Q. So that's your understanding

11:28:46 24 A. Compensation, yes.

11:28:46 25 Q. So that accurately describes your

11:28:48 1 understanding?

11:28:49 2 A. That is my understanding of the nature of the

11:28:51 3 plaintiffs' claims insofar as they relate to board to

11:28:55 4 overlapping boards.

11:29:00 5 Q. But isn't plaintiffs' claim different, I mean

11:29:03 6 not that that the fact of overlapping boards is itself

11:29:06 7 unusual, but the nature of the overlapping boards among

11:29:11 8 these companies permitted the spread of the agreements

11:29:15 9 from one company to another and facilitated the common

11:29:18 10 understanding? Isn't that what plaintiffs' allege?

11:29:21 11 A. I'm just trying to figure out the it may

11:29:25 12 well be what the Plaintiffs allege, but I'm trying to

11:29:28 13 figure out if that is a distinction without a difference

11:29:31 14 between these statements and what the plaintiffs are

11:29:32 15 alleging, that the existence of the board overlap created

11:29:39 16 or directly permitted defendants to effectuate the DNCC.

11:29:43 17 It sounds similar. They may not use the same words, but

11:29:46 18 I think it's

11:29:48 19 Q. It might help to use an analogy.

11:29:51 20 A. Okay.

11:29:51 21 Q. Are you familiar with price fixing cases?

11:29:53 22 A. Yes.

11:29:54 23 Q. Often in a price fixing case there is a trade

11:29:57 24 association that facilitates the cartel, where the cartel

11:30:00 25 members attend the trade association and they enter into

11:30:03 1 an agreement at the trade association. Are you familiar
11:30:05 2 with this concept?

11:30:07 3 A. I am, yes.

11:30:08 4 Q. And in those cases, challenging the
11:30:10 5 price fixing cartel, do you understand those cases to be
11:30:16 6 challenging the trade association as a violation or the
11:30:19 7 agreement to form a cartel as the violation?

11:30:22 8 A. It's the latter, yes.

11:30:23 9 Q. And so in this case, do you understand
11:30:24 10 plaintiffs to not be challenging the fact of overlapping
11:30:28 11 boards is a violation, but rather that the overlapping
11:30:32 12 boards facilitated anticompetitive agreements and a
11:30:36 13 common understanding?

11:30:37 14 MR. RUBIN: Objection. Form.

11:30:38 15 THE WITNESS: Yes, so my understanding I
11:30:39 16 mean it's going to come close to what I said here, but my
11:30:42 17 understanding is that the Plaintiffs are alleging that
11:30:44 18 the existence of the board overlaps are a key ingredient
11:30:46 19 to facilitating what they allege to be a conspiracy to
11:30:50 20 suppress compensation.

11:30:52 21 BY MR. HARVEY:

11:30:53 22 Q. You don't understand plaintiffs to be seeking
11:30:57 23 an injunction preventing board overlaps, do you?

11:31:03 24 A. Not that I've seen.

11:31:11 25 Q. Is it your opinion that but for these

11:31:13 1 agreements, the individuals serving on the other
11:31:17 2 defendants' boards would have decided not to self serve?
11:31:21 3 And so for instance, when we start with Paul Otellini
11:31:25 4 serving on the Google board.

11:31:26 5 A. I didn't make an assessment of his willingness
11:31:29 6 to serve on the board or not as a function of the DNCCs
11:31:37 7 or the DNCC guidelines. To the extent that board overlap
11:31:42 8 creates the opportunity for all kinds of
11:31:46 9 efficiency enhancing collaborations, and those
11:31:48 10 collaborations can be further facilitated by the
11:31:51 11 existence of some set of ground rules on attracting or
11:31:55 12 recruiting one another's one another's employees, it
11:31:59 13 seems conceivable to me that Mr. Otellini would have been
11:32:03 14 less excited about being on Google's board or would have
11:32:06 15 been less helpful as a board member. It is not clear
11:32:09 16 that he would have refused an appointment on the board.

11:32:13 17 Q. So why don't we just start with this first
11:32:17 18 point before I get into that. And that is, have you
11:32:20 19 identified any individuals who served on a board or
11:32:23 20 provided board like advice, and I think one example of
11:32:27 21 that is Bill Campbell

11:32:28 22 A. Yes.

11:32:28 23 Q. for any of these individuals, would any of
11:32:31 24 them have decided not and this is just they
11:32:35 25 wouldn't have done it at all, but for the agreements?

11:32:38 1 A. Yeah. So this is kind of a version from a
11:32:40 2 different direction of the conversation we were having
11:32:42 3 earlier about the intensive versus extensive margin.
11:32:46 4 I think my answer is going to be similar, that
11:32:47 5 I can't rule out that but for these agreements the person
11:32:51 6 would have stayed on the board or in the advisory like
11:32:54 7 capacity, but it seems quite quite plausible, and I
11:32:58 8 would my my opinion is probably likely or that
11:33:02 9 that it's likely that that their degree of engagement
11:33:07 10 in interaction and helpfulness as board members or
11:33:11 11 advisors, fiduciary advisors, would have been damped in
11:33:16 12 the absence of DNCC guidelines at Google.
11:33:21 13 Q. Let me start with the first one, the first part
11:33:23 14 of this, which is whether it would have happened at all.
11:33:27 15 Paul Otellini's membership of the Google board
11:33:31 16 precedes the do not call agreement, correct?
11:33:34 17 A. I believe it does, yes.
11:33:36 18 Q. And does Paul Otellini continue to sit on the
11:33:40 19 Google board today?
11:33:41 20 A. I don't know for sure. I think he does, but I
11:33:44 21 don't know for sure.
11:33:45 22 Q. He certainly sat after the agreements ended in
11:33:47 23 2009, correct?
11:33:48 24 A. Yes.
11:33:48 25 Q. Have you seen any evidence to suggest that he

11:33:50 1 became a less effective board member? And this is
11:33:53 2 specific specific evidence that Paul Otellini's
11:33:57 3 service on the Google board became less valuable to
11:34:02 4 Google after 2009.

11:34:04 5 MR. RUBIN: Objection. Form.

11:34:05 6 THE WITNESS: I haven't seen evidence one way
11:34:07 7 or the other on this. It is certainly conceivable,
11:34:11 8 because you've got to remember that the type of advice
11:34:14 9 that board members are going to be giving at any given
11:34:18 10 time is in part going to be predicated against
11:34:20 11 prospectively how will my advice be used?

11:34:24 12 So so it seems quite plausible to me, though
11:34:28 13 I haven't seen a document to evidence post 2009
11:34:32 14 evidence one way or the other that he has become more or
11:34:35 15 less effective on the Google board.

11:34:37 16 BY MR. HARVEY:

11:34:37 17 Q. Okay. And in Bill Campbell's case, he
11:34:40 18 continues to give advice to Google today, does he not?

11:34:43 19 A. I believe he does.

11:34:44 20 MR. RUBIN: Objection to form.

11:34:45 21 THE WITNESS: Excuse me. I believe he does.

11:34:47 22 BY MR. HARVEY:

11:34:47 23 Q. And I believe in your report you say that when
11:34:49 24 Larry Page replaced Eric Schmidt as a CEO, he started
11:34:55 25 coaching, or continued in maybe a different way, coaching

11:34:59 1 Larry Page, correct?

11:34:59 2 A. Yeah, I've seen documents consistent with that,

11:35:01 3 and it's reflected in my report.

11:35:04 4 Q. Have you seen any evidence this is the same

11:35:05 5 question, have you seen any evidence that Bill Campbell's

11:35:07 6 advice to Google has become less effective since 2009?

11:35:11 7 MR. RUBIN: Objection to form.

11:35:11 8 THE WITNESS: Again, I've not seen that

11:35:12 9 evidence. It is a difficult thing to measure. But given

11:35:17 10 that Campbell himself had had been worried about the

11:35:22 11 migration out of Intuit, that would reasonably factor in

11:35:28 12 to the type of advice or the depth of advice or the

11:35:31 13 sensitivity of advice he might give to to Mr. Schmidt

11:35:35 14 or Mr. Schmidt's successors.

11:35:37 15 BY MR. HARVEY:

11:35:37 16 Q. But you haven't actually assessed that one way

11:35:39 17 or the other, have you?

11:35:40 18 A. I have not tried to assess it quantitatively.

11:35:45 19 Q. And you are aware, are you not, that Bill

11:35:48 20 Campbell is also on the board of Apple?

11:35:52 21 A. Yes.

11:35:53 22 Q. The same question. Do you have any reason to

11:35:56 23 believe that Bill Campbell's advice or value on the Apple

11:36:02 24 board diminished after 2009 because the do not call

11:36:07 25 agreements were eliminated?

11:36:09 1 A. And I think it would be the same answer. I
11:36:11 2 would see reason why they they might well, but I have
11:36:14 3 not done a quantitative assessment of that.

11:36:17 4 Q. Okay. And this the argument you make about
11:36:23 5 the procompetitive benefits of kind of overlapping
11:36:26 6 boards, and I think in other places you refer to it as
11:36:29 7 corporate governance collaboration, is that relevant to
11:36:34 8 the agreement between Pixar and Lucasfilm?

11:36:37 9 A. You know, I haven't studied the agreement
11:36:39 10 between Pixar and Lucasfilm in much depth, so I don't
11:36:45 11 haven't really rendered an opinion about that. It is
11:36:48 12 relevant, I think, between the Intuit Google diad.

11:36:53 13 Q. And there is no such overlapping board
11:36:56 14 relationship between Apple and Adobe, is there?

11:37:00 15 A. I don't know one way or the other.

11:37:02 16 Q. Okay. In that section of your report,
11:37:48 17 beginning on page 5, I think it's part IV, you also
11:37:51 18 identify resolving conflicts of interest as a potential
11:37:55 19 benefit of do not call agreements, correct?

11:37:58 20 A. Can you point me to where you are

11:38:01 21 Q. And I'm discussing your your argument
11:38:03 22 generally, I'm not trying to tie you to a specific
11:38:05 23 paragraph or anything.

11:38:06 24 A. Okay. I'm just trying to yeah, I think you
11:38:17 25 are probably referring to the discussion that begins

11:38:19 1 around page 9.

11:38:29 2 Q. So the question was, is it part of your opinion

11:38:34 3 that the do not call agreements resolved excuse me

11:38:39 4 conflicts of interest between these these individuals

11:38:45 5 who sat on another company's board and that company?

11:38:50 6 A. So my my opinion is that the DNCC guidelines

11:38:56 7 can be viewed as playing a role of helping to mediate

11:39:00 8 potential conflicts of interest in in accordance with

11:39:03 9 good governance, principles, and applicable legal rules.

11:39:08 10 Q. What are the conflicts of interest you had in

11:39:09 11 mind here?

11:39:10 12 A. Well, one that we talked about a little earlier

11:39:13 13 is is the so called corporate opportunity doctrine,

11:39:19 14 which concerns the obligations of a director who who

11:39:27 15 has learned of or knows about a specific type of business

11:39:30 16 opportunity, that maybe maybe is a fiduciary of of

11:39:37 17 two firms, and is trying to figure out, do I alert both

11:39:42 18 firms to this business opportunity? Do I allow both of

11:39:46 19 them to to pursue the business opportunity? Can I

11:39:54 20 have a set of ground rules which is pretty clear how this

11:39:58 21 category of situations is going to be handled?

11:40:01 22 Q. Are there any other conflicts of interest you

11:40:03 23 have in mind here?

11:40:06 24 A. Well, there the the excuse me.

11:40:10 25 The corporate opportunity doctrine is a subset

11:46:05 1 paragraph 29, you cite to Delaware general corporate law,
11:46:10 2 Section 144, correct?

11:46:14 3 A. Yes.

11:46:15 4 Q. Okay. And that section, to your understanding,
11:46:20 5 provides a guide in terms of how companies should resolve
11:46:24 6 such conflicts of interest?

11:46:25 7 A. Uh huh.

11:46:26 8 Q. And what if these companies were to follow
11:46:31 9 Section 144, what would that process have been?

11:46:35 10 A. So if there were a a new business
11:46:38 11 opportunity that had arisen that that I'm going to
11:46:44 12 caveat this by the next section we're going to talk
11:46:48 13 about, because those two are related that I think
11:46:51 14 we're going to talk about, a new new business
11:46:53 15 opportunities is written.

11:46:56 16 Section 144 gives gives rise to a process by
11:47:00 17 which a board can either authorize or approve, or the
11:47:03 18 board's delegatee can authorize or approve, a a a
11:47:11 19 party to make a decision that has a conflict of interest
11:47:15 20 associated with it.

11:47:17 21 Q. And so the the member of the board with the
11:47:20 22 conflict presents the conflict to the board?

11:47:23 23 A. That's typically the way it happens, though not
11:47:26 24 always. There are devices by which particularly in
11:47:30 25 the corporate opportunity sense, where the board or some

11:47:36 1 other delegatee of the board may be able to reach a an
11:47:42 2 advanced authorization.

11:47:45 3 Q. Okay. So either you make the presentation to
11:47:48 4 the board or you do something which is the functional
11:47:51 5 equivalent?

11:47:54 6 A. Yeah, making a presentation to the board is
11:47:55 7 sort of dealing with the problem as it occurs. Another
11:47:58 8 way to try to do that is to set ground rules that would
11:48:02 9 deal with the problem ahead of time.

11:48:06 10 Q. And either way it is approved by the board,
11:48:08 11 correct?

11:48:08 12 A. Typically it doesn't the there will be a
11:48:12 13 question about what sorts whether the board has
11:48:15 14 delegated some of its powers to, you know, other board
11:48:18 15 members or corporate fiduciaries.

11:48:22 16 Q. And if you're a board member and you have such
11:48:26 17 a conflict, do you also have a duty to inform the board
11:48:29 18 or some designated representative, of the conflict?

11:48:33 19 A. It depends on whether one of these advanced
11:48:36 20 designations has been put into place. If it has, then
11:48:41 21 then it would presumably identify a class or category of
11:48:46 22 business opportunities for which there is no obligation
11:48:48 23 to inform the board about the conflict. And and then
11:48:55 24 it would not be necessary to go forward with the with,
11:48:59 25 you know because it is essentially being

11:49:02 1 pre authorized.

11:49:03 2 Q. Have you seen any evidence in this case that

11:49:05 3 the Google board made such an advanced designation to

11:49:08 4 deal with the conflicts of interest we have been talking

11:49:11 5 about?

11:49:11 6 A. I haven't seen evidence that the board as a

11:49:13 7 whole made that that designation one way or the other.

11:49:16 8 Q. Have you seen any evidence that some authorized

11:49:20 9 or, you know, some smaller group of people authorized by

11:49:24 10 the board made such a decision?

11:49:26 11 A. I haven't. The the report says it would be

11:49:28 12 fully consistent with this sort of, but I haven't seen

11:49:33 13 evidence one way or the other on this.

11:49:35 14 Q. Have you seen any evidence that the Intel board

11:49:37 15 made such a decision?

11:49:38 16 A. I do no the believe I have.

11:49:40 17 Q. Okay. And I'm presuming, because you didn't

11:49:42 18 look at it, the same is true for the other companies.

11:49:45 19 A. Correct.

11:49:45 20 Q. Have you seen any evidence in this case that

11:49:50 21 Paul Otellini informed the board of Google that he had

11:49:53 22 the conflict of interest you identified?

11:49:56 23 A. Well, in in some ways, yes. I think the

11:49:58 24 you know, the the site person that he was complaining

11:50:03 25 about is almost saying, "Listen, you are putting me by

11:50:09 1 recruiting this person, you are putting me into a
11:50:12 2 conflict of interest."

11:50:13 3 Q. That is Paul Otellini informing the board of
11:50:16 4 Google?

11:50:17 5 A. Well, it is an email. It is not directed
11:50:19 6 towards the board as a whole. But but there is a
11:50:21 7 complaint that is lodged by by Otellini along these
11:50:24 8 very lines.

11:50:25 9 Q. Have you seen any evidence to suggest that the
11:50:27 10 board of Google was aware of Paul Otellini's conflict and
11:50:32 11 then authorized some resolution of that conflict?

11:50:35 12 A. Not one way or the other, no.

11:50:39 13 Q. Are you aware that Bill Campbell informed the
11:50:43 14 board of Google that he was conflicted on this issue?

11:50:47 15 A. I've not seen evidence one way or the other on
11:50:49 16 that.

11:50:50 17 Q. Okay. You cite to the Shona Brown deposition
11:50:53 18 in your materials considered, correct?

11:50:55 19 A. I believe so, yes.

11:50:57 20 Q. Do you recall reading her deposition where she
11:50:59 21 says that she can't recall a single example of conflicts
11:51:03 22 of interest with Bill Campbell ever coming up?

11:51:09 23 A. It depends what one terms as a "conflict of
11:51:12 24 interest." So the it may be that was going through
11:51:15 25 I think I vaguely remember seeing this, but I'd have to

11:51:19 1 see the text to be sure about the context.

11:51:22 2 Q. Okay. So let's move on to the next paragraph.

11:51:26 3 I think you want to get to it.

11:51:29 4 Let's see. That is in reference to Delaware

11:51:34 5 general corporate law, Section 122 subsection 17. Do you

11:51:41 6 see that?

11:51:42 7 A. Yes.

11:51:42 8 Q. And tell me if I have this right. That section

11:51:46 9 reads: "Renounce, in its certificate of incorporation or

11:51:52 10 by action of its board of directors, any interest or

11:51:56 11 expectancy of the corporation in, or in being offered an

11:52:01 12 opportunity to participate in, specified business

11:52:04 13 opportunities or a specified classes or categories of

11:52:07 14 business opportunities that are presented to the

11:52:08 15 corporation or one or more of its officers, directors, or

11:52:13 16 stockholders." Is that the section you are citing to?

11:52:16 17 A. I believe so, yes. I'm not looking at it

11:52:18 18 myself, but

11:52:19 19 Q. Sure. Is there anything in that section I read

11:52:23 20 that, as you say here, quote, "particularly encourages

11:52:27 21 interlocking corporate boards to anticipate and establish

11:52:32 22 protocols to govern conflicts of interest"?

11:52:35 23 A. So this was a this was a section that is

11:52:37 24 relatively new. It was, I think, promulgated in 2000, as

11:52:44 25 I recall, and it followed on the heels of a number of

12:18:21 1 of how many of these employees would have been required
12:18:24 2 in each one of these. But one of the one of the
12:18:29 3 issues here is that the nature of the repetitiveness of
12:18:34 4 these interactions is such that it might have been very
12:18:37 5 difficult to tell at all, other than there might be quite
12:18:40 6 a lot of them.

12:18:42 7 Q. Okay. And the same question as to all of
12:18:47 8 these, have you seen any evidence that expressly links
12:18:50 9 any of these individual collaborations to the the
12:18:56 10 antisolicitation agreement between Google and Apple?

12:18:59 11 A. So do you mean expressly links in terms of
12:19:03 12 inside a written instrument that might be called a
12:19:06 13 contract?

12:19:07 14 Q. Yes.

12:19:08 15 A. I have not seen that kind of express link.

12:19:11 16 Q. Have you seen any other express link, such as
12:19:14 17 in deposition testimony?

12:19:15 18 A. I believe that I have seen deposition testimony
12:19:19 19 that by numerous parties saying that we were working
12:19:24 20 closely with them. We wouldn't have worked as closely
12:19:27 21 if if we thought that they were going to be poaching
12:19:31 22 our employees.

12:19:34 23 Q. We certainly don't have time to go through all
12:19:36 24 of these, but I think

12:19:38 25 A. I was getting excited.

12:19:40 1 Q. We will go through some of them.

12:19:42 2 A. Okay.

12:19:43 3 MR. HARVEY: All right. I'm going to introduce

12:19:46 4 plaintiffs' Exhibit 2925, which for the record is Bates

12:19:52 5 stamped 231APPLE124988. And I believe this is the one

12:20:18 6 you cite in footnote 36.

12:20:21 7 (Exhibit 2925 was marked for identification.)

12:20:31 8 THE WITNESS: Let me just triangulate in here.

12:21:06 9 I think this is it, yeah.

12:21:07 10 BY MR. HARVEY:

12:21:08 11 Q. If you could turn to page 2 of the document

12:21:10 12 A. All right.

12:21:13 13 Q. Well, first, I'm sorry. Let me just for the

12:21:15 14 record describe it. This document is entitled, "License

12:21:18 15 Agreement Between Google, Incorporated, and Apple

12:21:22 16 Computer, Incorporated," correct?

12:21:24 17 A. Sorry. Yes.

12:21:29 18 Q. And in the recital section in the first page

12:21:34 19 I'm sorry, the first page I'm still there it describes

12:21:37 20 that the purpose of this contract is at the parties'

12:21:42 21 desire to enter into an agreement to license certain

12:21:45 22 software from Google to Apple, correct?

12:21:47 23 A. And where are you reading this?

12:21:49 24 Q. Under the "Recitals" heading on the first page.

12:21:52 25 A. Yes, "It is the Parties' desire to enter into

12:21:55 1 an agreement to license their software, Google to Apple,
12:21:57 2 from source code form pursuant to the terms and
12:22:00 3 conditions set forth below."

12:22:02 4 Q. Now, if you could turn to page 2

12:22:04 5 A. Yes.

12:22:05 6 Q. there Section 1.9

12:22:08 7 A. Yes.

12:22:09 8 Q. defines what the agreement takes

12:22:11 9 "confidential information" to mean, correct?

12:22:14 10 A. Yes. It looks like it is a definition of
12:22:15 11 "confidential information."

12:22:17 12 Q. And this describes different forms of
12:22:19 13 intellectual property, correct?

12:22:25 14 A. It may be broader than that, actually.

12:22:27 15 Q. Sure. But it includes it, correct?

12:22:35 16 A. It probably includes it, yes.

12:22:37 17 Q. And it also includes other forms of
12:22:40 18 confidential business information, such as in little
12:22:44 19 Roman ii, [REDACTED] correct?

12:22:47 20 A. Yes.

12:22:49 21 Q. Okay. And if you could turn to page 14, there
12:23:03 22 in all right. There section 9 of the agreement is
12:23:10 23 entitled, "Confidentiality," correct?

12:23:13 24 A. Yes.

12:23:13 25 Q. And without getting into the details,

12:23:19 1 subsections 9.1 and 9.2 [REDACTED]
12:23:23 2 [REDACTED]
12:23:27 3 [REDACTED]
12:23:28 4 A. So let's see. [REDACTED]
12:23:34 5 [REDACTED]
12:23:37 6 [REDACTED]
12:23:45 7 Q. So is that a yes?
12:23:46 8 A. Yes. I just I restated your question to be
12:23:48 9 accurate with the paragraph.
12:23:49 10 Q. Okay. And if you could turn to page 18
12:23:54 11 A. Yes.
12:23:55 12 Q. and Section 13.12, there is that [REDACTED]
12:24:00 13 [REDACTED] isn't there?
12:24:05 14 A. Yes. There is another [REDACTED] on in
12:24:09 15 13.12.
12:24:11 16 Q. Okay. And you've presumably you've reviewed
12:24:19 17 this document before citing to it, if you need to read
12:24:24 18 through the whole thing, let me know, but anywhere in
12:24:27 19 this contract does it mention the antisolicitation
12:24:30 20 agreements at issue in this case?
12:24:35 21 A. So this is a very long document. I as I sit
12:24:38 22 here, I don't believe that it mentions them. But once
12:24:41 23 again, this may be similar to our Apple Google
12:24:45 24 non disclosure agreement that we discussed in
12:24:48 25 Exhibit 2924, that that there is a question about what

12:24:56 1 would be naturally included in this document, and if a
12:25:01 2 an agreement that was already a background understanding
12:25:05 3 or agreement was there, it may not be naturally included
12:25:10 4 in this document.

12:25:11 5 Q. And, in fact, it is prohibited by section
12:25:14 6 13.12, isn't it?

12:25:17 7 A. What is prohibited?

12:25:18 8 Q. That some some understanding some oral
12:25:24 9 prior or contemporaneous understanding is incorporated as
12:25:28 10 part of this agreement.

12:25:29 11 A. Well, there there are two caveats to that.
12:25:34 12 One is is that under usual rules of interpretation in
12:25:42 13 contracts, if something would not be naturally included,
12:25:45 14 then this this may not be deemed a fully integrated
12:25:48 15 agreement, even with a merger clause within it.

12:25:53 16 Second, the the interpretation of use or
12:25:59 17 prohibitions may be informed by the existence of other
12:26:05 18 agreements as well, including prior or contemporaneous
12:26:11 19 written or oral agreements.

12:26:13 20 This is, I believe, I can't be sure, I believe
12:26:19 21 this is a contract that is at least executed in
12:26:22 22 California, and it may have a choice of law provision,
12:26:27 23 but I have to read through it to find it.

12:26:31 24 And yes, there it is, 13.4, [REDACTED]

12:26:42 25 [REDACTED]

12:26:47 1 [REDACTED]

12:26:49 2 [REDACTED] et cetera, et cetera.

12:26:52 3 So so there is a choice of law provision

12:26:55 4 that puts it in [REDACTED] as well. [REDACTED] has been

12:26:58 5 particularly open to the inclusion of extraneous or parol

12:27:07 6 evidence for purposes of interpretation since 1969 in a

12:27:13 7 case that you might remember, PG&E vs. Thomas Drayage, a

12:27:19 8 lovely case.

12:27:28 9 Q. Is it your opinion that the two individuals who

12:27:30 10 signed this contract, Phil Schiller at Apple and Marissa

12:27:35 11 Mayer at Google, didn't know what they were doing when

12:27:38 12 they signed the agreement?

12:27:40 13 MR. RUBIN: Objection. Form.

12:27:42 14 THE WITNESS: I have no basis to know whether

12:27:44 15 they knew what they were doing or did not know what they

12:27:47 16 were doing. They are both fairly well known people.

12:27:51 17 BY MR. HARVEY:

12:28:00 18 Q. I'm happy to go through some of the other

12:28:02 19 examples, unless we can short circuit it.

12:28:05 20 A. Okay.

12:28:06 21 Q. Do you have any reason, sitting here today, why

12:28:08 22 your answers would be different for any of the other

12:28:11 23 contracts you cite to in this section, in terms of the

12:28:14 24 you know, the substantive sections I pointed to you in

12:28:17 25 this contract?

12:28:17 1 A. Yeah. I think I understand the nature of the
12:28:19 2 question. I I think we may be able to short circuit.
12:28:22 3 I believe my answers would be consistent with this. They
12:28:25 4 may be varied in nuance ways, but as I sit here today, I
12:28:30 5 suspect they would be consistent. There's obviously some
12:28:33 6 inexactitude to that expectation, but I believe they
12:28:37 7 would be.

12:28:39 8 Q. Okay. I think I will skip it.

12:28:48 9 For these contracts, Google and Apple thought
12:28:51 10 it worthwhile to sit down and hash out the language in
12:28:54 11 those contracts, correct?

12:28:55 12 A. Probably

12:28:58 13 MR. RUBIN: Objection. Form.

12:28:59 14 THE WITNESS: Excuse me. Someone hashed these
12:29:01 15 out. They may be drawn from earlier examples, but there
12:29:05 16 clearly seems to be some indication people thought these
12:29:08 17 collaborations were worthwhile proceeding and
12:29:12 18 memorializing.

12:29:13 19 BY MR. HARVEY:

12:29:13 20 Q. And someone considered the issue of
12:29:15 21 confidentiality and creative provisions to address that
12:29:18 22 concern, correct?

12:29:19 23 A. There are some provisions in here that reflect
12:29:22 24 issues of confidentiality.

12:29:25 25 Q. Is it your opinion that these collaborations

12:29:28 1 were so worthless that they would not have been worth
12:29:31 2 doing if they needed a lawyer to spend another two
12:29:35 3 minutes inserting language regarding the antisolicitation
12:29:38 4 agreements?

12:29:39 5 MR. RUBIN: Objection. Form.

12:29:40 6 THE WITNESS: So once again this will go back
12:29:43 7 to an earlier discussion that that you and I were
12:29:45 8 having, Mr. Harvey, that I don't have an opinion about
12:29:48 9 whether they would be worthless. There may still be some
12:29:51 10 worth to these collaborations. The depth, intensity, and
12:29:57 11 value created by them may well, and I I believe
12:30:01 12 probably would be lower, or it's at least a plausible
12:30:06 13 business judgment that they would be lower if the fear in
12:30:09 14 sharing confidential information were accompanied by a
12:30:12 15 fear that your co venturer, your counter party is going
12:30:18 16 to solicit the very employees that you make available to
12:30:21 17 them.

12:30:22 18 BY MR. HARVEY:

12:30:23 19 Q. In drafting those contracts, why, in your view,
12:30:25 20 didn't they have a paragraph talking about a
12:30:28 21 non solicitation?

12:30:32 22 MR. RUBIN: Objection to form.

12:30:33 23 THE WITNESS: Well, one of the reasons, as I
12:30:35 24 mentioned earlier and I think we discussed, that in sort
12:30:37 25 of a relational contracting scenario, the the

13:26:59 1 narrowly tailored, I it seems plausible to me that you
13:27:03 2 could identify them. If the scope is larger, and in
13:27:07 3 Mr. Campbell's case, one of the difficult issues is that
13:27:10 4 Mr. Campbell was acting as a very senior advisor to the
13:27:15 5 CEO of Google, then that would be a different objective
13:27:20 6 of the collaboration.

13:27:23 7 Q. But Google's I'm sorry.

13:27:25 8 But Mr. Campbell's advice to Google began long
13:27:28 9 before the conspiracy in this case, correct, and that's
13:27:32 10 long before 2005?

13:27:35 11 MR. RUBIN: Objection. Form.

13:27:36 12 THE WITNESS: I believe that Mr. Campbell's
13:27:37 13 relationship to Google and its CEO predated when it is
13:27:43 14 alleged that that Intuit became appeared began
13:27:48 15 to appear on the DNCC list at Google as a general matter.

13:27:54 16 BY MR. HARVEY:

13:27:54 17 Q. So when Google and Intuit were identifying the
13:27:58 18 individuals that they listed, this occurred during Bill
13:28:03 19 Campbell's advice to Google, but before Intuit was added
13:28:09 20 to Google's do not call list, correct?

13:28:12 21 MR. RUBIN: Objection. Form.

13:28:13 22 THE WITNESS: Can you repeat the question?

13:28:30 23 (Record was read as follows: "QUESTION: So
13:28:30 24 when Google and Intuit were identifying the individuals
13:28:30 25 that they listed, this occurred during Bill Campbell's

13:28:30 1 advice to Google, but before Intuit was added to Google's
13:28:30 2 do not call list, correct?"

13:28:30 3 THE WITNESS: So I understand that that they
13:28:33 4 may have the identification of this group 15, 18, 20
13:28:38 5 people before the the general addition on on
13:28:42 6 Google's do not call list; that Mr. Campbell was engaged
13:28:48 7 in this advice contemporaneously. I don't have the exact
13:28:52 8 dates of the of those two, but I think they are both
13:29:01 9 going on before Intuit was added to the general
13:29:06 10 do not call list.

13:29:07 11 BY MR. HARVEY:

13:29:07 12 Q. Did you study Google's attempt to enter into an
13:29:10 13 agreement with Facebook?

13:29:12 14 A. I did see some emails along those those
13:29:15 15 lines, yes. I don't know if it was an attempt to enter
13:29:23 16 an agreement. I saw emails between Google and Facebook.

13:29:27 17 Q. Did you see the email in which Bill Campbell
13:29:29 18 tells people at Google to go seek a truce with Facebook
13:29:33 19 with respect to recruiting and hiring?

13:29:41 20 A. I think I may have seen that, yes.

13:29:43 21 Q. At that time, had you identified any actual or
13:29:47 22 potential collaborations that existed between Google and
13:29:51 23 Facebook?

13:29:52 24 A. I did not identify any. I don't believe that
13:29:57 25 Facebook ever ended up on Google's do not call list.

13:30:03 1 Q. And that's because Facebook declined Google's
13:30:05 2 request, correct?

13:30:08 3 MR. RUBIN: Objection. Form.

13:30:09 4 THE WITNESS: I did see some email exchanges, I
13:30:13 5 believe, involving Sheryl Sandberg once she had arrived
13:30:18 6 at Google excuse me at Facebook, and and they
13:30:24 7 were related to to the recruitment of employees.

13:30:32 8 There were some references to possible collaborations,
13:30:36 9 but I don't believe I saw evidence that any of them came
13:30:39 10 to fruition.

13:30:42 11 BY MR. HARVEY:

13:30:43 12 Q. Sitting here today, do you recall any possible
13:30:46 13 collaborations

13:30:47 14 MR. RUBIN: Objection

13:30:47 15 MR. HARVEY: that they were discussing at
13:30:48 16 the time?

13:30:49 17 MR. RUBIN: Sorry. Objection. Form.

13:30:50 18 THE WITNESS: I I can't recall specifically,
13:30:52 19 but I believe there was some general discussion in the
13:30:55 20 email. I'd have to look at the email to be

13:30:59 21 BY MR. HARVEY:

13:31:12 22 Q. You did not review the Deposition of Jonathan
13:31:14 23 Rosenberg, correct?

13:31:16 24 A. I don't believe so. The depositions I reviewed
13:31:18 25 are on the

13:31:19 1 Q. Yeah, I'm looking at them, too.

13:31:21 2 A. Yeah.

13:31:22 3 Q. Did you review the declaration of Sheryl

13:31:24 4 Sandberg? It is not listed in the declaration category.

13:31:31 5 A. I don't believe I did review that, yes.

13:31:34 6 Q. Was there an overlapping board member between

13:31:36 7 Google and Facebook at the time?

13:31:40 8 A. I am not certain. I don't know.

13:31:42 9 Q. You don't know either way?

13:31:43 10 A. I don't know either way.

13:31:44 11 Q. Was there an individual like Bill Campbell who

13:31:47 12 operated as sort of a kind of a de facto board member?

13:31:50 13 A. I don't believe so, but I'm not sure.

13:31:55 14 MR. HARVEY: Why don't we go off the record.

13:31:58 15 THE VIDEOGRAPHER: We are now off the record at

13:31:59 16 4:31 p.m.

13:32:00 17 (Recess was taken.)

13:41:53 18 THE VIDEOGRAPHER: This is Tape 7 of the

13:41:54 19 Deposition of Dr. Eric Talley. We are now on the record

13:41:57 20 at 4:41 p.m.

13:41:59 21 BY MR. HARVEY:

13:42:00 22 Q. Dr. Talley, could you please turn to page 26

13:42:06 23 and look to paragraph 69.

13:42:10 24 A. Yes.

13:42:11 25 Q. There you say in the last sentence, "For

13:42:15 1 example, although the Google Intuit DNCC was first
13:42:20 2 introduced in connection with the QuickBooks
13:42:23 3 collaboration, it was expanded to all Intuit employees
13:42:27 4 not because of a technical project, but because of a
13:42:29 5 corporate governance collaboration with Mr. Campbell."

13:42:32 6 Do you see that?

13:42:33 7 A. Yes, I do see that.

13:42:35 8 Q. And the support you cite for that proposition
13:42:38 9 is footnote 97, correct?

13:42:40 10 A. Yes, it appears so.

13:42:42 11 Q. And that's an email from a Jay Sims to others,
13:42:46 12 correct?

13:42:46 13 A. Yes, it appears so, yes.

13:42:48 14 Q. Do you know who these individuals are in the
13:42:50 15 email?

13:42:51 16 A. I can't recall offhand. I think I did a little
13:42:56 17 bit of diligence in who they were at the time, but I
13:42:58 18 can't recall who they were right now.

13:43:00 19 Q. Do you recall roughly? I mean were these
13:43:02 20 employees of Intuit or were they someone else?

13:43:05 21 A. You know, I can't remember, I'm sorry.

13:43:08 22 Q. Would it surprise you to learn that J. Sims was
13:43:10 23 an attorney for Intuit, and this is a document drafted by
13:43:13 24 Intuit's lawyers sent to attorneys at the Antitrust
13:43:16 25 Division of the Department of Justice?

14:16:59 1 BY MR. HARVEY:

14:17:00 2 Q. These defendants entered into agreements not to

14:17:02 3 recruit each other's employees, correct?

14:17:05 4 MR. RUBIN: Objection. Form.

14:17:06 5 THE WITNESS: As I said earlier, the report

14:17:08 6 stipulates arguendo that these were agreements, but once

14:17:13 7 again, understand that to be in dispute.

14:17:16 8 BY MR. HARVEY:

14:17:17 9 Q. So aggregating the defendants in this case,

14:17:21 10 what's artificial about that?

14:17:25 11 A. A couple of things. First of all, the

14:17:27 12 directionality of the of the alleged do not cold call

14:17:29 13 agreements seem not to be not to be the same across

14:17:34 14 defendants. As we discussed earlier, the Intuit the

14:17:37 15 alleged Intuit Google do not call cold call agreement

14:17:42 16 appears to be one way.

14:17:43 17 Second, if one were to place the seven

14:17:47 18 defendants, you know, in a in a circle and try

14:17:50 19 and and get a sense of, you know, where the alleged

14:17:54 20 agreements were, you would not fill out every possible

14:17:59 21 line of that circle. They they not everyone is

14:18:02 22 connected to everyone else. Indeed, Google itself

14:18:06 23 appears only connected to three of the remaining six

14:18:10 24 six companies by the allegations of the Plaintiffs.

14:18:14 25 So so I guess that's the sense in which I

14:18:18 1 was, you know, thinking, well, these are not necessarily
14:18:22 2 the same sets of agreements.

14:18:25 3 Q. Okay. But you didn't study the agreements that
14:18:29 4 did not have Google as a party, correct?

14:18:31 5 A. I did not focus on those agreements.

14:18:33 6 Q. Okay. In the third full sentence on page 20,
14:18:40 7 you say, "Two companies can be both," quote, "high tech,"
14:18:45 8 unquote, "and yet have no employees with overlapping
14:18:49 9 technical skills." Do you see that?

14:18:51 10 A. Yes.

14:18:52 11 Q. Is it your testimony that any two companies in
14:18:56 12 this case that are party to a no cold calling agreement
14:19:00 13 had no employees with overlapping technical skills?

14:19:04 14 MR. RUBIN: Objection. Form.

14:19:05 15 THE WITNESS: No, I don't think that's my
14:19:06 16 testimony. No. It's is this a statement of
14:19:09 17 possibility.

14:19:10 18 BY MR. HARVEY:

14:19:10 19 Q. Okay. And what you do in Table 1, these are
14:19:15 20 codes for products, correct? These are codes concerning
14:19:20 21 what these companies are selling.

14:19:23 22 A. The way that industrial sectors are are
14:19:27 23 usually organized is through what sort of products are
14:19:31 24 they are they selling?

14:19:34 25 So that may not be all of what goes into it,

14:19:37 1 but that is the predominant determination.

14:19:41 2 The companies self report that in their SEC

14:19:47 3 findings, and so one measure that that I examined is

14:19:51 4 what the companies say in their SEC filings; and the

14:19:53 5 other one is the data provider that I used for some of

14:19:57 6 the data I used in the report rolls up a little bit more

14:20:01 7 fulsomely these these industrial codes, and tries to

14:20:06 8 get at larger scope. You sort of when you fill out an

14:20:11 9 SEC filing, you just have to fill out one of these SIC

14:20:15 10 forms. So I took two measures of it.

14:20:35 11 Q. So you didn't attempt to look at documents

14:20:37 12 produced in the case to determine whether the defendants

14:20:40 13 consider themselves to be competitors for employees,

14:20:43 14 correct, such as evidence concerning salary budgets, you

14:20:51 15 know, comparing their own salary budgets against the

14:20:54 16 salary budgets of the codefendants.

14:20:57 17 MR. RUBIN: Objection. Form.

14:20:58 18 THE WITNESS: Well, one thing that I did do in

14:20:59 19 the report, I don't know if this will answer your

14:21:02 20 question, is to to get a sense of if we were to

14:21:06 21 include if we were to assume these were all

14:21:09 22 competitors for the same employees, then it would be

14:21:12 23 reasonable to assume that that all other companies,

14:21:17 24 and I think I limit it to Bay Area companies with more

14:21:21 25 than a thousand employees, also would be within the

1 I, Rosalie A. Kramm, Certified Shorthand
2 Reporter licensed in the State of California, License No.
3 5469, hereby certify that the deponent was by me first
4 duly sworn and the foregoing testimony was reported by me
5 and was thereafter transcribed with computer aided
6 transcription; that the foregoing is a full, complete,
7 and true record of said proceedings.

8 I further certify that I am not of counsel or
9 attorney for either of any of the parties in the
10 foregoing proceeding and caption named or in any way
11 interested in the outcome of the cause in said caption.

12 The dismantling, unsealing, or unbinding of the
13 original transcript will render the reporter's
14 certificates null and void.

17 X Reading and Signing was requested.

18 | Reading and Signing was waived.

19 _____ Reading and signing was not requested

20

21 | Page

ROSALIE A. KRAMM

CSR 5469, RPR, CRR